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THE GENERAL WAR POWERS OF THE PRESIDENT

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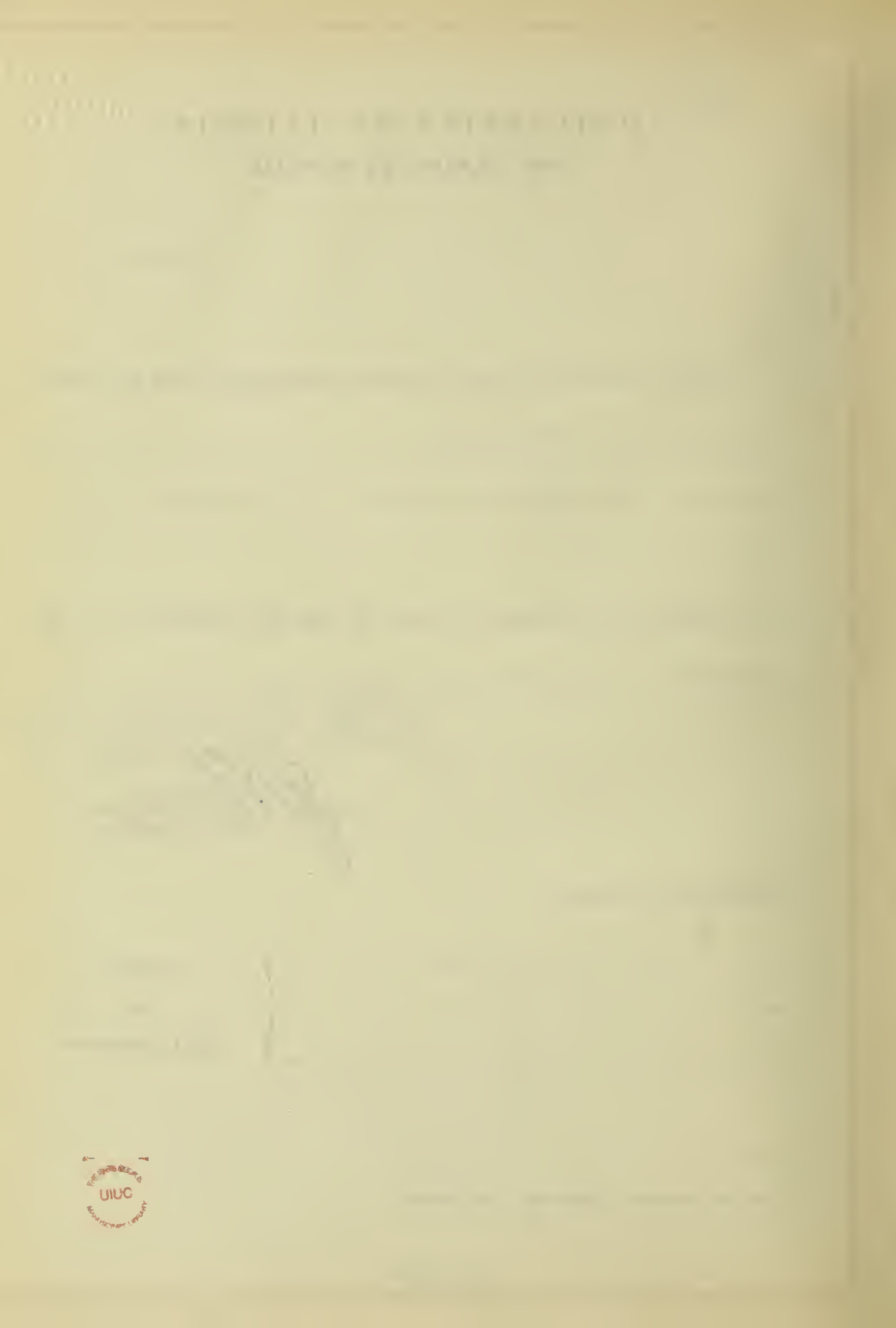
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Introduction.

In considering the war powers of the President we are dealing with some of the most elastic powers provided for in the Constitution. The President holds these powers in time of peace as well as in time of war. As Commander-in-chief he is made the country's defender. In most cases his judgment and his will prevail. The Constitution centralizes the war powers in order more directly and speedily to meet emergencies while Congress is in and out of session.

The President commands the military forces. He wages war, declares blockades, establishes martial law, makes arrests, suspends the writ of habeas corpus and may become a dictator limited only by his own judgment as best to preserve, protect and defend the Constitution. During a war he may seize property, acquire territory and establish military government, levy and collect taxes and act the part of a sovereign. But these powers are temporary and apply only in times of war. When peace is declared Congress assumes control and civil government is established.

At the time of the adoption of the Constitution when the need of a union was felt to be paramount, little reference was made to these great powers of the President. Hamilton in the "Federalist" of March 25th, 1788, tactfully merely mentions them but dwells at some length upon the President's power of pardon with its spirit of "humanity and good policy". Since the adoption

of the constitution the powers have been exercised and tested during the war of 1812, the war with Mexico, the Civil war, the war with Spain in 1898 and during the present war in Europe. At the present time, in addition to the powers that the President of the United States already possesses, our Congress has by several special acts given the President very extraordinary war powers relating to the production of foods, transportation, espionage, control of war supplies and such other powers as are deemed necessary for the successful prosecution of the war.

The discussion that follows will deal with the various powers of the President which he possesses by virtue of being Commander-in-chief of the armed forces. It shall be my aim to show how the powers are acquired, what specific powers are given by the Federal Constitution and what other powers are granted and acquired by means of statutes, court decisions and custom.

SECTION I.

Constitutional Provisions.

The Constitution of the United States provides that before the President elect enters upon the duties of his office he shall take the following oath or affirmation; "I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States".¹ This done the President is clothed with the full powers of an executive together with the duties and responsibilities that follow.

Immediately following the oath of office the Constitution provides for the war powers of the President to be as follows: "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United states; he may require the opinion in writing of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."²

Such in brief are the war powers of the President. These have been defined and enlarged by court decisions, acts of Congress and practice. The one thing that has stood in the way of crystalizing these powers into definite rules has been the difficulty of striking a balance between political power and individual liberty.

1. Article II, Sec.7, par.7.

2. Article II, Sec.2.

Direct and Supervisory Powers. As commander-in-chief of the armed forces the President exercises a direct control through his power of appointment and removal. The power of appointment is provided for in Article II, section 2 of the Constitution which states that "He shall nominate, and by and with the consent of the Senate shall appoint". Section 3 provides that "he shall commission all officers of the United States, and the Constitution further provides that Congress may by law vest the appointment of such inferior officers as they think proper in the President alone.

Concerning removals the rule is that the President may remove any officer in the military service at any time for reasons which he deems sufficient. In time of peace officers are removed through the decisions of courts-martial. No constitutional provisions govern removal, but the first United States Congress, by legislative construction, in deference to President Washington, recognized the existence of these powers in the President and subsequent executive practices have established the rule.

Power over the Militia. The President's power extends to the militia of the several states when called into the actual service of the United States. The militia consists of all able-bodied male citizens between the ages of 18 and 45. It exists in two principal divisions, namely the organized militia commonly known as the National Guard and the Naval Militia, and the unorganized division known as the Reserve Militia. Congress is given the power by the Constitution to provide for the calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion. But the President, it has been admitted by courts, is the sole and

exclusive judge to determine when the causes are sufficient for calling the militia. The first provision for its call was made by Act of Congress of February 28, 1795. The first clause of the first section of this act authorizes the President to call out the militia to repel invasion. The second clause provides for calling the militia to suppress an insurrection against a state government. To complete the certainty of the powers thus given by Congress the Supreme Court has affirmed it in the case of *Martin v. Mott*,¹ 1872 where the court says: "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of those facts." This much of the President's power is assured.

The organized militia has been called into service by the President at various times; in the war of 1812 to repel invasions on the north; in 1861 to suppress the insurrection incident to the Civil War; in 1916 to suppress the Mexican border troubles, and in 1917 "in view of the consequent danger of aggression by a foreign enemy" when Germany made war upon our commerce, issued orders interfering with our freedom of travel upon the seas, destroyed our factories, incited labor riots and strikes and made war upon us in other ways. Our standing army was not large enough.

President Lincoln called 75,000 militia men from the various states by proclamation on April 15, 1861 by virtue of the power supposedly given him by act of Congress of February, 1795.² Under the provisions of the same statute he again called into service, on

1. 12 Wheaton, 191

2. Life of Lincoln, vol. 2.

May 3, 1861, state militia men as volunteers totaling 42, 034. At the same time he increased the regular army. The right of the President to compel volunteers to remain in the service was an open question and, therefore, Congress, by act of July 22, 1861. authorized the Chief Executive to accept volunteers up to 500,000 men. Again by act of Congress, three days later, he was authorized to call these men and muster them into service for the period of the war. Only a few volunteers came forward under this law and Congress authorized the President by act of July 29, 1861, to call forth the militia of any or all the states. Again on July 31, 1861, Congress by an act gave the President authority to accept the services of volunteers without previous proclamation in such numbers as the President might think necessary.¹

The Draft Act of 1863. The needs of the government and the absence of any efficient organized militia system made necessary the compulsory provision of the act of March 3, 1865. This act provided for the drafting into the service all able-bodied citizens and aliens between the ages of 20 and 45, who had declared their intentions to become citizens.² Free negroes in the North and negroes who had escaped from their Southern masters were seeking to enlist. The question of their citizenship came up. The Dred Scott Case had decided that negroes are not citizens and therefore they would not come under the Draft Act. Congress removed this difficulty by amending the act, the enrollment act so called, by the subsequent act of February, 1864, which provided that "all able-bodied male colored persons between 20 and 45, residents in

1. Whiting: War Powers under the Constitution, pp. 478-9

2. Winthrop: Military Law, pp. 38 and following.

the United States shall be enrolled according to the provisions of this Act and of the Act of March 3, 1861, and form part of the national force." President Lincoln was urged to get a decision on the Draft Act from the Supreme Court. He was favorable to this but said he could not delay recruiting until such a time. The supreme courts of several states declared the Enrollment Act as constitutional. The cases of *Inedler v. Lane*, *Nickels v. Lehman* and *Smith v. Lane*¹ decided by the Supreme Court of Pennsylvania furnish illustrations where men resisted the draft. The court called attention to the constitutional provisions for creating armies and calling forth the militia, and pictured the disorder that would result if men were permitted to ignore the draft.

The Civil War times were the first to make any considerable test of the war powers of the Commander-in-chief. Frequently President Lincoln acted without any specific authority from Congress. The Congress invariably approved his acts and voted him larger powers.

The Militia in the Present War. During the present war it was at first thought best to use the regular army and additional forces of volunteers not limited by any constitutional restrictions which governs the militia. After some investigation of the experiences in England and France with the volunteer and draft systems Congress passed the Draft Act of May 18, 1917, "to authorize the President to increase temporarily the military establishment of the United States". This was followed by the President's Proclamation of July 3, 1917, wherein he states that, "Whereas, the United States and the Imperial German Government are now at war, and

having in view the consequent danger of aggression by a foreign enemy upon the territory of the United States" etc. "I, Woodrow Wilson, President of the United States, by virtue of the authority vested in me by the Constitution and the Laws of the United States, call into the service of the United States as of and from the dates hereinafter indicated all members of the National Guard and all enlisted members of the National Guard Reserve of the following States, who are not now in the service of the United States", etc. Farther on in section 2 of this proclamation he says: "I do hereby draft into the military service of the United States and of and from the fifth day of August, 1917, all members of the "ational Guard"etc. Section 3 continues: "All persons hereby drafted ----- stand discharged from the militia and -----be subject to the laws and regulations governing the Regular Army."

Previous to this proclamation, and on May 18, 1917, the President proclaimed a registration day pursuant to an act of Congress of same date giving him this power, affecting "all male persons between the ages of 21 and 30 both inclusive, and all persons so registered shall be and remain subject to draft into the forces hereby authorized."

It is clear from the foregoing that the President derives his powers for calling the militia into the service from Congress which has the power to provide for the organization of the military establishment. This power of the President to enforce the Draft was tested in the Federal Courts in the cases of *U. S. v. Sugar*¹, and *Story v. Perkins*². These cases were carried to the Supreme Court which upheld the constitutionality of the Draft, January 7,

1. 243 Fed. 423.

2. 243 Fed. 997.

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SECTION II.

Power to Declare War.

Though the Constitution gives Congress the power to declare war, the President has the power to wage a defensive war prior to a declaration by Congress. The Statute of 1807,¹ as given by Whiting,² provides that "whenever it is lawful for the President to call forth the militia to suppress an insurrection, he may employ the land and naval forces for that purpose." The authority to use these forces is thus expressly granted, but the manner in which they are to be used is not prescribed. This is left to the discretion of the President who it is presumed will be guided by the usages and principles of civilized warfare.

Chief Justice Taney in delivering the opinion of the Supreme Court in *Martin v. Mott*, referred to on page 5, said: "It belongs exclusively to the President to judge when the exigency arises in which he has authority under the Constitution, to call forth the militia, and his decision is conclusive on all other persons." According to this opinion the President has the right to act in advance of Congress should a foreign nation or an insurrectionary body of citizens endanger the peaceful rights of the United States. Again the Court in the *Prize Cases*³ lays down the rule that "if a war be made by invasion of a foreign nation, the President is not

1. Chapter 39.

2. Whiting, p. 57.

3. 2 Black, 635.

only authorized but bound to resist force by force. He does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority." The Court goes on to enlarge upon the President's powers by saying that "whenever the President is fulfilling his duties as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the Government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is, of itself, official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."

President Polk put the United States in war with Mexico before Congress declared war. President Lincoln met the Confederacy in war for about three months before Congress took action. Lincoln established the first blockade on April 19, 1861 and thereby recognized the Confederacy as a belligerent. On July 13 of the same year Congress formally declared war to exist. To make certain of his position Lincoln asked Congress to pass an act legalizing his acts. This was done.

Our relations with Spain in 1898 will furnish another illustration. Congress declared war on Spain on the 25th of April to take effect from the 21st because President McKinley had so maneuvered his forces as to make this necessary. In addition to a declaration of war Congress directed and empowered the President to

use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several states to such extent as may be necessary to carry this act into effect.

During the present war, in 1917, President Wilson, in a message to Congress, recommended that Congress declare the existence of a state of war with Germany. Congress acted upon the President's recommendation and on the 6th of April, 1917 passed a joint resolution to the effect "that a state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared." While this resolution was being debated Senator Stone of Missouri and others maintained that Congress had supreme control over the declaration of war and was not subject to any of the President's war powers. The results favored the recommendation.

From the above provisions and practices governing the declaration of war it is clear that the President is not a mere passive observer. His authority is derived from the Constitution and his duties are expressed in his oath of office. The Constitution makes him Commander-in-chief of the armed forces and leaves him free to use his own judgment to determine when American rights and liberties are violated. During the last three wars the President has declared a state of war to exist and Congress in each case has officially recognized the conditions so declared. Added to this we have Supreme Court decisions, as in the Prize Cases, which hold that the President is within his power to say war exists.

SECTION III.

The President's Military Jurisdiction .

The President's military jurisdiction in time of war is very extensive. As Commander-in-chief of the armed forces he exercises special powers in the field of military and martial law, and at times he has suspended the writ of habeas corpus. In this section I shall deal with his jurisdiction under these heads with a view to make clear his powers.

The President is the chief executive of military law both written and unwritten. The former at the present time is laid down in the Articles of War enacted by Congress, August 29, 1916, other statutes, enactments, army regulations, general orders etc. The latter, or unwritten law, is embodied in the custom of war. And martial law is defined in the Manual for Courts-martial, U. S. Army, 1917, under two heads: (1) Military law at home, which is military power in time of war, insurrection or rebellion in parts of a country retaining their allegiance, and over persons and things not ordinarily subjected to it. (2) Martial law applied to army is described as military power extended in time of war, insurrection and rebellion over persons in the military service where military law does not apply, nor otherwise regulated by law. Both forms of martial law are governed by the doctrine of necessity to a condition of war, and spring from the right of national self preservation.

Military Law. Military law is a branch of the municipal law

of the nation. It exists in two main divisions, namely military law proper governing the armed forces as such, and the Laws of War which are the rules of authority and jurisdiction over persons both civil and military, in force in time of war and at any other time when military force is resorted to. Minthrop points out in his book on "Military Law" that the President has large powers and is clothed with discretionary powers to order military courts for the army by virtue of his constitutional capacity as Commander-in-Chief. In 1872 in the case of Major Runkle¹ the powers of the President were disputed but were affirmed by the court's decision. Courts under military law are established for the purposes of discipline and punishment. The Chief Executive is governed by the provisions of the law as enacted. Certain discretionary powers are provided for in the Constitution giving the President the power of pardon which will be discussed under Section IV. The discretionary power as a reviewing officer is given to him by the Revised Statutes². In this the general provisions are that the President has reviewing authority when he has convened the court, and in particular as provided by statute that a sentence shall not be "carried into execution until it shall have been confirmed by the President, with the exceptions³ that "all death sentences, sentences of dismissal of officers in time of peace, all sentences in time of peace or in time of war respecting general officers, and as provided in Article III: "Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the

1. 19 Ct.Cl. 396.

2. Section no. 1342.

3. Article 105, R.S. 1342.

pleasure of the President shall be known. The as to the validity of the President's confirmation of a sentence we have the Supreme Court's decision in the case of *Fynes v. Hoover*¹ where the Court says: "And if a sentence be so confirmed it becomes final, and must be executed, unless the President pardons the offenders. It is in the nature of an appeal to the officer ordering the court, who is made by law the arbiter of the legality and propriety of the courts sentence. When confirmed it is altogether beyond the jurisdiction of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise." From this it is evident that the Court regards the court martial as final and that the civil tribunals or courts have no jurisdiction over sentences of courts martial which have been convened regularly and proceeded legally.

Military Commissions. Another method of trial and punishment of offenders under the laws of war which illustrates the President's control is by military commissions. The authority for the commission is contained in the constitutional provision which authorizes military government and martial law. The commission was first used by General Scott in Mexico, 1847, to punish violent crimes committed by soldiers and civilians. Congress by Act of March 5, 1863, recognized this court and has given it extended jurisdiction. The principles of law governing cases tried by the commissions are found in the common law of war², While these commissions have re-

1. 20 Howard, 9.C.Rep. 78.

2. Whiting p. 521.

ceived sanction from the United States Congress they exist, as Whiting says, under the authority of Congress by the general powers of the President as Commander-in-chief.

The president also has the power to compel the attendance of witnesses under the Act of Congress of April, 1806 which established the Courts of Inquiry.

Suspension of the Writ of Habeas Corpus. The Commander-in-chief has at all times exercised the extraordinary power of suspending the writ of Habeas Corpus. President Lincoln suspended the writ in the case of John Merryman, 1861. Questions arose as to the President's rights. Chief Justice Taney expressed an opinion on this case in which he said: "The only power which the President possesses where life, liberty or property of a private citizen is concerned, is the power and duty prescribed in the 3d section of the 2d article of the Constitution which requires 'that the shall take care that the laws shall be faithfully executed' He is not authorized to execute the laws himself, or through agents or officers, civil or military appointed by himself. It is made his duty do come in aid of the judicial authority, if it shall be resisted by force too strong to be overcome without the existence of the executive arm. ----- With such provisions in the Constitution expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus." Chief Justice Taney also denied to Congress the right to suspend the writ as affecting persons "not subject to the rules and articles of war" because the 6th amendment of the Constitution provides that "in all criminal prosecutions the

accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed," etc. On April 19, 1861, President Lincoln authorized General Scott, the Commanding General of the United States Army to suspend the writ of habeas corpus for the public safety if resistance is found which renders it necessary. This came without authority from Congress.

Congress, however, by Act¹ specifically vested in the President the authority whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States. Pursuant to this Act, President Lincoln issued his proclamation of September 15, 1863, suspending the writ by authority of the President, throughout the United States during the existing rebellion in all cases where military, naval and civil officers of the United States, or any of them holding persons under their command, or in their custody. And, I do hereby require all magistrates, attorneys, and other civil officers of the United States to take distinct notice of this suspension and to give it full effect, and all citizens of the United States to consist and govern themselves accordingly." Again we find that President Lincoln suspended the writ in Kentucky July 5, 1864.

With reference to the suspension of the writ in sections of the country outside the theatre of war we have the famous case of "Ex parte Milligan"² in 1867. In this case the Supreme Court vindicated the supremacy of the civil over military power within the theatre of war. It also held that military commissions organized

1. March 3, 1863, par. 81.

2. 18 L. Ed., 201.

during the war in a state not invaded and not engaged in the rebellion, and in which the Federal Courts were open and active in the exercise of their judicial functions, were without jurisdiction to try, convict and sentence a person, for any criminal offense, who is not in the military or naval service nor a resident of a rebellious state, nor a prisoner of war. This case has often been regarded as settling the question of the right to suspend the writ. The Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it." This gives Congress Powers to suspend the writ and does not mention anything about the theatre of war. Congress can by law delegate to the President the power to suspend the writ. His own power is not sufficient.

In 1871 President Grant suspended the writ of habeas corpus in ten counties of the State of South Carolina without being especially authorized by Congress. The Act of 1863 had expired with the end of the war in 1866. The chief objection to the suspension of the writ is that it interferes with the rights guaranteed by the Constitution in the Bill of Rights, and that such suspension gives too arbitrary a power into the hands of the President. By weight of legal authority as well as by act of Congress it is a well settled principle that the President has not the power by virtue of his office, to suspend the writ.

SECTION IV.

Powers of Pardon and Mitigation.

We are familiar with the conditions that led to the establishment of military courts and the suspension of the writ of habeas corpus throughout the whole United States to be that such offenders as discouraged enlistments, gave aid and comfort to the rebels and employed other disloyal practices might be subject to martial law and liable to trial and punishment by courts-martial or military commissions. Rhodes in his United States history says that during the Civil War "many of the military courts were governed by insolent officers and the public had been thoroughly aroused". Not only were the offenders dangerous but the courts were arbitrary and justice was denied. In such cases the President exercises the general powers of pardon given to him by the Constitution in order to check the miscarriage of justice.

The Constitution provides that the Commander-in-chief shall have powers to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The general powers of pardon include the power of granting amnesty to groups of persons who have offended against the government; it also includes the power of pardon or remission to individuals for particular offenses. This power of pardon or remission may be divided into commutation and mitigation. A pardon by remission is in effect to blot out all guilt and to restore the accused to his legal rights and privileges

as if nothing had taken place, with the exception that if discharged from office he may or may not be restored. Commutation substitutes for one penalty another of a lesser degree. A death sentence may be commuted to life imprisonment. Mitigation reduces a penalty in quantity or amount as, for example, a 20 years term of imprisonment may be reduced to 10 years, or a fine of \$1,000 may be mitigated to \$500.

The President's powers to grant reprieves is exercised as a power to stay execution for a short period or a temporary suspension of a sentence.

The general powers of pardon, according to Winthrop in his work on military law, may be exercised at any time in behalf of an accused person, prior to the trial or conviction of offenders, or after trial and conviction. The Constitution imposes no limitations upon the President.

In the case known as *Ex parte Garland*¹ the Court says in speaking of the Constitutional powers given to the President the following: "The power thus conferred is unlimited. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken ordering their pendency, or after conviction and judgment. This power of the president is not subject to legislative control. A pardon blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. The only limitation to its operation is that it does not restore office forfeited, or property or interest vested in others in consequence of the conviction of the judgment."

1. 18 L. Ed. 366; 4 Wall. 353.

When the Constitution imposes no limitations upon the President, nor expressly gives Congress any power to limit him he is free to act as his judgment dictates and is not subject to legislative control. In practice amnesty and commutation are made conditional and thus a limitation is imposed. A sentence is commuted on condition of past services or some forfeitures. Amnesty requires an expression of good faith. President Lincoln issued a proclamation of Amnesty, December 8, 1863, "to all persons who had directly or by implication participated in the existing rebellion" on condition of an oath to "henceforth faithfully support, protect and defend the Constitution of the United States, acts of Congress with reference to slaves, abide by and faithfully support all proclamations of the President having reference to slaves," etc. To show its good faith the South was permitted to reconstruct the Southern states with a republican form of government guaranteed by the Federal authorities provided not less than 10 per centum of the people of the states, based upon the voting population, should take the oath and organize a government.

SECTION V.

Extraordinary Measures.

During war times the President may resort to extraordinary measures such as placing embargo on goods, establishing blockades, confiscating enemy property and entering into international agreements with foreign powers. His right to resort to these measures is given by acts of Congress generally though he may act upon the basis of his implied powers as will be seen from a survey of what has come to be the established practice.

Blockades. In 1806 and 1807 England declared the ports of France blockaded. President Jefferson recommended an embargo on all American shipping for the protection of American ships that were in danger of being captured in European ports. This was authorized by Congress. It was argued at the time that Congress did not have the power to destroy, that while the Constitution gave Congress power to regulate commerce it did not give it power to annihilate it. The Supreme Court has not decided this point but inferior courts¹ have decided that the embargo act was valid, that it was not intended to destroy, but was a means of protection to foreign commerce.

In time of war the President may establish blockades. This power comes as a result of actual warfare and the general powers of the President to direct the armed forces against the enemy. Hitting says that when the President has decided in his own mind that he is

1. 2 Story, Const. 1280-1282.

dealing with a public enemy in arms he may so act as to declare a state of war and extend the rights and liabilities of belligerent law to the enemy. This is purely a political question and not within the powers of the courts to determine and decide, and a power not given to Congress. The power to declare a blockade rests entirely with the President.

President Lincoln blockaded the southern ports. On April 19, 1861 he proclaimed a blockade of the South from South Carolina to Texas both inclusive, "to protect the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased." On April 27, 1861 the blockade was extended to include Virginia and North Carolina. In doing this he was guided by the conditions of war and acted without any authority from Congress.

In the present war the United States is actively assisting the Allies in blockading the Central Powers in Europe. Germany is blockaded by an embargo on goods to her neighboring countries. Limiting exports to these countries make the blockade of Germany more effective so that it will be respected.

When a blockade is declared it operates to officially notify neutral powers of the existence of a state of belligerency, so that they may govern themselves accordingly. In the *Prize Cases*¹ the Court says that "The President as the executive chief of the government and Commander-in-chief of the army and navy was the proper person to make such notification, his not been and cannot be disputed". The president is not limited in any way except by the

1. 2 Black, 635.

rules of International Law which require that a blockade to be legal must be effective.

Confiscation of Enemy Property. Enemy property may be confiscated in order to harass, weaken and destroy the enemy. When war has been declared the belligerent countries are governed in their relations by the rules of International Law and the law of Military Necessity, and enemy property is protected to certain degrees by these rules as laid down in the Hague Conventions, the Laws of Land Warfare and practices. The Hague Conventions declare that private property on land is not subject to seizure, and provisions are made for the use of such property by the invader by requisitions, contributions and fines. The Commander-in-chief is governed by these rules.

Long before the first meeting of the Hague Conferences and during the Civil War, President Lincoln, on August 16, 1861, by proclamation forbade intercourse with the rebel states and declared a forfeiture of all goods and conveyances going to said states, and after 15 days of "all vessels belonging in whole or in part to any individual of any of the said states, wherever found." Again by the Confiscation Act of July 17, 1862, "the act to suppress treason and rebellion, to seize and confiscate the property of rebels." The intention expressed by the framers was that Congress could free the slaves and give them employment in camps, forts, etc. Lincoln in his message to Congress¹ denied that Congress had the right to free the slaves, and on the question of confiscation of enemy property as provided in the act, Lincoln said, would result in the divesting of title forever. This would mean that forfeiture would extend be-

1. Life of Lincoln, 7.2, p.311.

yond the life of the guilty parties, whereas the Constitution of the United States declares that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained. The President thought the bill unconstitutional and returned it to the house in which it originated. Congress has no extraordinary war powers. Its powers are contained in the Constitution. It cannot deprive persons of life, liberty and property without due process of law. It remains for the President in time of war to resort to such other measures as will protect his forces and destroy the powers of the enemy.

The most sweeping method of confiscating enemy property was put into operation by Lincoln in his Emancipation Proclamation of November 22, 1862 taking effect in January 1, 1863, by which he liberated all the slaves in the states in rebellion against the union. Lincoln said that this enemy property was being used in aid of the rebellion and was subject to confiscation. While it could not be actually seized it could at least be declared free. Rhodes in his United States History tells us that "the immediate response of the country was apparently favorable. 'God bless Abraham Lincoln!' the New York Tribune said, and it spoke for the radical and fervent Republicans. Many conservatives endorsed it because it came from the mind and pen of the President." Because this vast amount of property was under a sympathetic cord was struck throughout the north in behalf of the negro slave and the issue of war became a fight for liberty and freedom of mankind on a larger basis than heretofore. As a war measure it had the effect of unifying the North and volunteers came forward more freely to enlarge the armies. The elections that followed immediately upon the Proclamation showed

results adverse to Lincoln's views. But public opinion took shape the following year after the conservative and reactionary wave had spent itself. The common people had faith in Lincoln and armies were forthcoming. The legality of the President's action in thus freeing the slaves is questionable. The Constitution gives him the power to wage war, to preserve, protect and defend the Union and the measures employed may be largely discretionary with the Commander .

SECTION VI.

Power over Acquired Territory.

The President's power to govern acquired territory in time of war and after until such time as Congress may see fit to legislate for the acquired territory has been definitely established by practice and court decisions. In time of war he delegates expressly or impliedly to the commanders of the armies under him the authority to govern occupied territory. In the Mexican War the United States acquired possession of Upper California and in 1847 the Commander-in-chief of the army established a military government over the conquered territory. In the case of *Cross v. Harrison*¹ the question of whether this government could lawfully continue after the treaty of peace, was decided affirmatively by the court saying: "The government maintained by the President over a conquered territory being belligerent is absolute in character according to the general doctrines of international law regarding military occupation. The government of which Colonel Mason was executive, has its origin in the lawful exercise of a belligerent right over a conquered territory. It has been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not as a matter of course, or as a necessity of consequence of the restoration of peace cease to exist. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he

did not do so. Congress could have put an end to it, but this was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed."

Another illustration of military occupation was found in the South after the Civil War. Military districts were formed by authority of the President, and after a time the people of the states were nominally permitted to carry on a form of civil government. This government was never recognized by Congress. Both Houses denied seats to the representatives and senators chosen. The Supreme Court, however, recognized the government¹ as established by the President as defacto only.

A more recent illustration of military occupation can be had from the time when the Spanish forces surrendered at Santiago, Cuba. President McKinley put the island under military government and gave instructions to the military commander how to conduct it. These instructions² illustrate what the President's powers are over occupied territory as provided by the Hague Conventions which now govern such occupation in civilized countries. They are in part as follows:

"The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their person and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the

1. Texas v. White; 7 Wallace, 730.

Handlin v. Heckliff; 12 Wallace, 174.

2. Moore's Int. Law Digest, Vol. 2, pp. 281-283.

purposes of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, not upon any part or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, cooperate with the United States efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation shall be as free from severity as possible."

The subsequent paragraphs deal with various conditions such as all things may remain as they are "so far as they are compatible with the new order of things until they are suspended or superseded". Measures indispensable to the maintenance of law and order will be adopted. Real property may be held by the occupant and administered but not destroyed. Revenues may be collected and administered. Private property must be respected and if used must be paid for. Contributions must be applied so as not to savor of confiscation. All ports shall be open to commerce.

Occupation as defined by the Hague Convention on the Laws and Customs of war on land, article 42 is as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself." Then as to the power of the occupant we read in article 43 that "the authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in

his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." While the article seems to impose restrictions upon the occupant, the phrase "unless absolutely prevented" seems to leave matters largely to his discretion and he is practically free to do what is to his advantage. The only positive check upon the commander is that military occupation is usually not permanent. As Congress assumes control by legislative enactment civil government begins and the war powers of the President over conquered territory is at an end.

SECTION VII.

International Agreements.

In times of war and at other times the President has the power to negotiate agreements through the foreign office with other countries and settle international questions. Willoughby says¹: "He exercises this power as Commander-in-chief of the army and navy from both necessity and convenience."

Butler in his "Treaty Making Power in the United States"² says that, "when the foreign offices of two countries agree in a matter and reduce it to writing it is often called a protocol. It is not, so far as the United States is concerned, a treaty and does not become the supreme law of the land. How far it is binding upon the national conscience is therefore a political and not a legal question." Such agreements, of necessity, must be binding upon the executive department which makes them, but before they acquire any legal force they must as a general rule be ratified by the Senate as provided in the Constitution.

For an illustration of this power of the President we have the protocol of 1898 which provided for a commission to negotiate a treaty with Spain. Article I provides as follows: "Spain will relinquish all claim of sovereignty over and title to Cuba." Article II provides that, "Spain will cede to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in

1. Vol.1, p.471.

2. Vol.2.

the West Indies, and also an island in the Ladrones to be selected by the United States." Article VI provides that upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, etc. The United Senate had no part in this agreement with Spain which practically ended the war and named all the conditions of peace. Spain accepted its provisions and the United States Senate subsequently formally ratified the provisions in a definitive treaty.

Another illustration is the Boxer Protocol with China in 1901 which provided for the withdrawal of the allied forces, for the payment of indemnities by China, for a prohibition of importation into China for two years of arms and amunitions, etc. In this the President acted alone and without the aid of the Senate. One more illustration may be had from the administration of President Roosevelt when, in 1905, he acted alone in dealing with the administration of customs in San Domingo, with a view to satisfy foreign creditors of that country. The United States Senate considered the matter but failed to act. The President did not want to delay any longer. He took the initiative and carried his program through.

SECTION VIII.

Recent War Powers.

In addition to the established rules and laws of war the United States Congress has given very special powers to the President to meet conditions and emergencies during the present war. President Wilson called a special session of the 65th Congress on April 6, 1917. This Congress put power into the hands of the President numerous acts among which is the so called "Espionage Act", the Food Control Act and the Trading with the Enemy Act. Congressman Gardner of Massachusetts declared: "Nothing impressed the public more than the great confidence placed in the President." While the President has great war powers by virtue of being Commander-in-chief of the armed forces it seems that President Wilson prefers to put much of the responsibilities upon Congress and has urged legislation authorizing the President to act.

The joint resolution that declared a state of war with the Imperial German Government on April 6, 1917, also declared that, "the President be, and is he hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on the war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." It now became the duty of Congress to provide armed forces and resources in order that the President may carry out the duty imposed upon him by this

joint resolution. This has proved to be a difficult task because of pro-German influences and a strong opposition from peace parties who believe that the war would end if the soldiers on the fighting line could be made to distrust their own government and rely upon the enemy's offers of protection and universal peace. However great results have been achieved.

On May 12, 1917, Congress gave the President authority to take over enemy vessels in our ports and to operate and equip such vessels in any service of the United States.

The War appropriations act of June 15 authorized the President to place orders with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature and quantity usually produced or capable of being produced by such a person; to modify, suspend, cancel, or requisition any existing or future contract for the building or purchase of ships or material; to require the owner to place his plant at the disposal of the Government; to requisition any plant; to purchase or requisition for use by the United States any ship constructed or in process of construction. The authority ceases 6 months after a final treaty of peace is proclaimed with the German Government. To carry out this program the President appointed a shipping board which is directing the work. In addition to building ships negotiations have been made for additional tonnage with Holland and Japan. Holland objected to certain conditions and her ships were seized under the "lex anglica" which permits a belligerent nation to use neutral tonnage if compensation is paid. Japan has agreed to furnish ships in exchange for steel plates.

The so-called "Espionage Act". Congress by special Act of June 15, 1917, gave the President extensive powers over espionage. The act is divided into 13 parts, called titles.

Title I defines new grades of espionage and penalties for offenses and repeals previous acts.

Title II provides that when the President by proclamation declares that a national emergency exists, the Secretary of the Treasury is authorized to make regulations governing vessels in the territorial waters of the United States.

Title VII gives the President the right to declare an embargo whenever the public safety shall demand it.

Title VIII gives the President authority to deal with false statements, misrepresentations and conspiracy to injure or destroy specific property situated within a foreign country at peace with the United States.

Food Control Act. On August 10, 1917, Congress passed the Food Control Act authorizing the President to make such regulations and issue such orders as are essential to carry out the provisions of this act. There are 27 sections to this act which gives in detail the powers of the President.

Section 2 gives the President the right to enter into any voluntary arrangements, to create and use any agency, to accept the services of any person without compensation, to utilize any department or agency of the government and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

The President appointed Herbert Hoover as Food Administrator under this act. His powers are extensive and extraordinary. All

hoarding and destruction, monopolization, or discriminatory practices are declared unlawful. Penalties are fixed for violations. Section 9 provides that any person who restricts the supply or distribution of any necessities shall, upon conviction be fined not exceeding \$10,000, or be imprisoned for not more than two years, or both. Section 10 authorized the President to requisition foods, fuels and other supplies necessary for the support of the army and navy. Section 11 authorizes him to purchase, store, and to sell for cash at reasonable prices, wheat, flour, meal, beans, potatoes. Section 12 authorizes him to requisition and operate any factory, packing house, oil pipe line, mine, or other plant in or through which any necessities are or may be produced, prepared or mined. Other sections give him the power to license concerns, require them to issue reports, and recently several have been closed by Mr. Hoover for failing to properly register.

Section 25 of the foregoing Act authorizes the President to fix the price of coal and coke and to establish rules and regulations for the production, distribution and storage, and section 26 provides for penalties in cases where persons store or destroy articles suitable for fuel with the intention of affecting prices. To effectively control the fuel situation President Wilson, on August 25, 1917, appointed Mr. H. A. Garfield, President of Williams College to the position of Fuel Administrator. Restrictions were put upon the use of fuel by manufacturing plants and stores. The result, Mr. Garfield says, was that the whole country responded to relieve the conditions realizing that the spirit of purest patriotism and extreme necessity were the motives that inspired the regulations.

Section 27 appropriates \$10,000,000 with which the President

is authorized to procure such stock of nitrate of soda as he may deem necessary and find available for agricultural production during the years of 1917 and 1918, and to dispose of this nitrate for cash at cost.

Trading with the Enemy Act. On October 6, 1917, Congress passed the "Trading with the Enemy Act" which provides for giving the President powers to govern commercial intercourse with an enemy or ally of an enemy. Whenever the President in his judgment shall deem that the public safety so demands he may establish such regulations as are necessary between the United States and any foreign country. He may also place an embargo on imports from any country. This act also contains a provision for the sequestration of enemy property. President appointed Mr. H. Mitchell Palmer to the position of Custodian of Enemy Property. His duties are to take over and manage enemy property and administer it so as to guard against any violations of the Trading with the Enemy Act. All enemy aliens owning property in the United States are required to report to the Custodian and list their property. All property owned by enemy aliens is also listed.

In addition, the President has created the War Industries Board, through the Department of War, with the powers to regulate and control such industries as produce war materials of every sort. This board announced on May 1st that it had fixed the price of hides and skins, and allowed dealers 3% profit on ungraded wool and 3 1/2% profit on graded wool.

Control of Traffic. On the 26th of December, 1917, President Wilson issued a proclamation calling attention to a government control of all traffic to begin at 12 o'clock noon on the 28th of

December. This control extends to "each and every system of transportation and the appurtenances thereof located wholly or in part within the continental United States. This takes control of all railroads, inland and coastwise transportation by water including all terminals and equipments, elevators, warehouses, telegraph and telephone lines. William C. Cadoe was made Director General with paramount authority and must be obeyed as such. Street electric passenger railways and interurban lines are not included.

The combined rail and water systems are put under government control to the end that troops, war material and equipments may be transported to the exclusion, so far as may be necessary, of all other traffic. While so controlled the transportation systems are given immunity from attachment by mesne process or an execution except by prior written consent of the Director.

This proclamation was issued by authority of Act of April 6, 1917, authorizing the President to employ the entire military and naval forces of the United States and the resources of the Government to carry on war against the Imperial German Government.

The control ceases 12 months after a final treaty of peace is proclaimed with the German Government.

SECTION IX.

Conclusion.

The most important war powers of the President provided in the Constitution are his power to command the armed forces, his power to grant pardons and the large and undefined discretionary powers that he possesses by virtue of being Commander-in-chief. Congress has from time to time tried to define these powers of the President by appropriate legislation. The most that Congress can do in times of war, and the duty imposed upon it by the Constitution is to provide for the army and navy and to assist the Commander.

At the present times Congress has granted the President many extraordinary powers and made him virtually a dictator. In addition to having control of the army and navy and of the state militia that is called into service he has been given control over the resources of the Government. He has been given powers to control the food supply of the nation including the production, manufacture and transportation of foods with the right to take possession of such food supply as he may need for his armed forces. Vast sums of money have been voted for supplies and equipments, and the army and navy have been increased in number. All this comes under the President's control as Chief Commander. When Congress declared a state of war it automatically put the President into supreme command to direct the military forces to defeat the enemy. At the same time Congress assumed the duty of supporting the President

and must give him such aid as the Commander-in-chief deems necessary to his success.

The President's war powers begin with the outbreak of hostilities and end with or shortly after a return to peaceful conditions. The powers are of a temporary nature, but their supremacy in times of stress have been tested and approved. They are thoroughly centralized in the Chief Executive, by constitutional provisions, so as to leave the prosecution of a war as unhampered as possible and to secure efficiency through a concentrated one man control.

The End.

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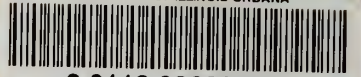
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